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SYMPOSIUM EDITOR
PROFESSOR HOLNING LAU

AN INTRODUCTION TO INTRAGROUP DISSENT AND ITS LEGAL IMPLICATIONS *Holning Lau* 537

HOW LAWYERS MANAGE INTRAGROUP DISSENT *Scott L. Cummings* 547

This essay, adapted from the keynote speech for the conference, reflects upon how lawyers respond to dissent within social movements—over the goals of social change efforts and the means of pursuing them. Drawing upon case studies from the LGBT rights and labor contexts, it describes specific challenges to managing dissent within "top-down" and "bottom-up" lawyering models. From the top-down, it explores how lawyers in the California marriage equality movement addressed repeated legal challenges over litigation tactics. From the bottom-up, it describes how lawyers for a community-labor coalition dealt with competing conceptions of the public good in a campaign to stop Wal-Mart from opening a supercenter in one Los Angeles neighborhood. As the cases suggests, how well movement lawyers manage dissent shapes the effectiveness and legitimacy of what they achieve.

CAPITAL DEFENDERS AS OUTSIDER LAWYERS *Kathryn A. Sabbeth* 569

What role can lawyers play in the internal disputes of a community to which they are outsiders? This essay highlights two core rationales for outsider intervention in support of internal dissent. It examines these rationales in the case of capital defenders from the U.S. North in the U.S. South. The position as an outsider can provide the will and freedom to launch direct attacks on injustice. Frequently, outsiders also bring superior resources for the fight. When outsiders engage in direct social critique, however, they can be accused of cultural imperialism. As an alternative, outsider lawyers can marshal indirect challenges, using professional tools of conventional lawyering. Yet this can also backfire. The notion of expertise may be tainted by perceptions of an elitist invasion, and, unlike classic cause lawyering, conventional lawyering may lack a narrative with substantive moral force. The case of capital defenders suggests that to support lasting social change outsider lawyers must amplify the voices of local community members and their expressions of intragroup dissent.

Immutability and Innateness Arguments about Lesbian, Gay, and Bisexual Rights *Edward Stein* 597

A popular and intuitively plausible type of argument for the rights of lesbians, gay men, and bisexuals is based on claims that sexual orientations are inborn and/or unchangeable. Many advocates of such rights view expressing doubts about the immutability and innateness of sexual orientation as tantamount to opposing gay rights. Legally, claims that sexual orientations are innate and/or immutable intersect with the so-called immutability factor in equal protection jurisprudence. This article considers the legal, ethical, and empirical support for arguments for LGB rights based on immutability and innateness. I raise a variety of problems for such arguments in various contexts, including amicus briefs associated with recent Supreme Court cases about marriage equality for same-sex couples. My analysis helps explain and contextualize disagreement within the LGBT community about the wisdom and efficacy of appeals to immutability and innateness.

Intragroup Discourse on Intragroup Protections in Muslim-Majority Countries *Asma T. Uddin* 641

Many Muslim-majority countries do not provide adequate protection for dissent of any sorts—religious, social, or political. In the realm of religious dissent, these countries persecute not just non-Muslims, but in fact, the persecution is harshest and most frequent against Muslim dissenters. This paper explores how protection for intragroup dissent in these countries is the first and most crucial step in protecting dissent more broadly and lays out both the current state of affairs and several avenues for reform.

The European Court of Human Rights and Intragroup Religious Diversity: A Critical Review *Lourdes Peroni* 663

This Article examines the ways in which one of the most established human rights courts—the European Court of Human Rights—encourages or discourages intragroup religious diversity when dealing with religious freedom claims. In particular, it critically assesses the Court's attentiveness to internal group diversity by scrutinizing the objective filters that the Court employs to determine whether certain practices "count" as a manifestation of claimants' religion for legal purposes. The Article argues that, at times, these filters are based on assumptions about religion and religious groups that impede recognition of more lived experiences of religion and internal group diversity. The Article further contends that making objective filters more porous to such experiences and diversity may therefore require reconsidering implicit understandings of religion and eschewing assumptions of orthodoxy about certain religious groups, especially when these assumptions are formulated in ways that fix and naturalize some religious practices as *the* defining ones for the entire group.

The Art of Racial Dissent: African American Political Discourse in the Age of Obama *Kareem U. Crayton* 689

What does the art of dissent from a group look like in the context of race and politics? How does this element of political discourse resemble dissent in the more typical settings, such as the courts? And how might this brand of dissent be distinguished from the more common forms of the enterprise? In this piece, I develop a thesis of "racial dissent," defined here as the act of speaking against a prevailing norm or principle within a given racial group. I outline a general argument for how racial dissent operates, including the review of structural pressures

that racial dissenters often face in the political arena. Using the experience of African Americans in contemporary politics, I point out how racial dissent is especially difficult in light of Barack Obama—the nation's first African American president. I explore these issues using individuals that exemplify distinct brands of racial dissent and provide an assessment of the strategies of racial dissent that hold the greatest potential for success.

DISSENTING IN AND DISSENTING OUT *Nancy Leong* 723

The intense legal and social preoccupation with the appearance of diversity and nondiscrimination both reflects and reinforces a process I call "identity capitalism." Through that process, ingroup individuals and ingroup-dominated institutions derive value from outgroup identity. This process results in the commodification of outgroup identity, with negative consequences for both outgroup members and society. Outgroup members actively participate in the process of identity capitalism in various ways. In particular, they leverage their outgroup membership to derive social and economic value for themselves. I call such outgroup participants "identity entrepreneurs." In this essay, I apply the framework of identity entrepreneurship to the notion of dissent within outgroups and discuss the different ways in which such dissent serves to leverage identity.

THE PIPER LECTURE

EMPLOYERS AS RISKS *Amy B. Monahan* 751

In evaluating health and retirement security in the United States, much recent work has focused on shortcomings in individual decision making. For example, in explaining why 401(k) plans are suboptimal for achieving retirement security, a significant volume of literature has catalogued the mistakes individuals make when attempting to save for retirement through such plans. This article seeks to move the discussion of suboptimal decision making in a new direction, by focusing on the impact that employer decision making has on the ability of employees to achieve health and retirement security. The article argues that employer decision making regarding whether to offer health and retirement plans and, if offered, what form such benefits will take, has a significant impact on the ability of employees to achieve health and retirement security. The article concludes by offering initial thoughts on methods to control this employer-level risk.

STUDENT NOTES

PARTICIPATORY DEMOCRACY AND THE ENTREPRENEURIAL GOVERNMENT: ADDRESSING PROCESS EFFICIENCIES IN THE CREATION OF LAND USE DEVELOPMENT AGREEMENTS *Ramsin G. Canon* 781

Can the development agreement become a tool for community-based planning? Development agreements and related land use planning instruments have steadily increased in popularity over the last few decades. Standard zoning regimes have proven to be too rigid and inflexible to accommodate the evolving nature of large-scale, and particularly mixed-use, developments. The bilateral nature of development agreements also allows cities and counties to effectively compete for development dollars by crafting incentives. However, this type of ad-hoc planning can run afoul of the reserved powers doctrine and its progeny, and can face vehement political and social opposition. This type of opposition results in process inefficiencies, in the form of unnecessary risk, deleterious delay, and sometimes-disastrous financial losses. This paper considers the various jurisprudential and political challenges facing these types of planning instruments, and offers progressive alternatives that could both allow for flexibility, and better incorporate principles of community empowerment into the planning process. Elements of charettes, community-based research, mutual gains negoti-

ation, and transparency are all considered as elements of a flexible, but still accountable, planning process less susceptible to judicial challenge and less likely to spark political opposition.

EXPANDING THE AFTER-ACQUIRED EVIDENCE DEFENSE TO INCLUDE POST-TERMINATION MISCONDUCT *Holly G. Eubanks* 823

In 1995, the United States Supreme Court formulated the after-acquired evidence defense in employment discrimination litigation. The defense, if successfully established, allows the defendant to limit the damages available to the plaintiff. In order to assert the defense, a defendant must establish that it would have terminated the plaintiff based on after-acquired evidence of wrongdoing if the defendant had known of the wrongdoing prior to the termination. The defense, as generally accepted, applies to misconduct that occurs during employment and misconduct that occurs prior to employment in the application process. This note considers the potential expansion of the defense to include the plaintiff's post-termination misconduct and ultimately argues in support of that conclusion.

RETHINKING TRADITIONAL CONCEPTIONS OF CHILD PORNOGRAPHY: AN ANALYSIS OF HOW THE U.S. SUPREME COURT'S DECISION IN *STEVENS* IMPACTS THE ILLINOIS SUPREME COURT'S DECISION IN *PEOPLE V. HOLLINS* *James D. Konstantopoulos* 849

In 2010, the U.S. Supreme Court, in deciding United States v. Stevens, held that rational basis review was no longer sufficient to criminalize depictions of acts if the acts depicted are themselves legal. In 2009, Marshall Hollins entered into a consensual sexual relationship with his seventeen-year old girlfriend. As is becoming common in our technological era, where every phone can record video and photographs and send those files to other devices, Mr. Hollins and his girlfriend used the technology available to them to document one of their excursions. Following his conviction for child pornography, Mr. Hollins challenged the Constitutionality of the Illinois statute under which he was charged. This note will answer the dissent of Illinois Supreme Court Justice Anne Burke. This note will not only analyze the effect that consideration of the Stevens case might have had on the Illinois Supreme Court's decision but will also propose a solution to consent laws that, due to the different ages at which they regulate related conduct, create a confusing grey area of legality to those not trained to analyze the interrelationships between statutes.

HIDDEN HOME VIDEOS: SURREPTITIOUS VIDEO SURVEILLANCE IN DIVORCE *Rebecca V. Lyon* 877

In divorce court, often a very contentious and emotional court, parties frequently use what they can to gain the upper hand. The invention of new technology gives them an even wider arsenal. While tracking each other on the computer or checking phone records has become common, courts are now encountering instances where one spouse has placed hidden video cameras around the house to catch the other spouse doing something wrong. Under many state laws, courts have been forced to conclude that the surreptitious video recordings are not illegal. Perhaps more surprisingly, a few courts have concluded that the law either allows or requires the court to admit the recordings into evidence in divorce proceedings. This article examines the possible implications of allowing secret video recordings between spouses and the consequences of bringing these recordings into the courtroom. This article concludes with suggestions to limit the negative impact of these surreptitious video recordings.

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Alexandra Molesky, B.A., J.D.
Adjunct Professor of Law
Ira A. Moltz, B.A., J.D.
Adjunct Professor of Law
J. Michael Monahan II, B.A., J.D.
Adjunct Professor of Law
Rachel Moran, B.A., J.D.
Adjunct Professor of Law
James J. Morici, B.A., J.D.
Adjunct Professor of Law
Gia L. Morris, B.A., J.D.
Adjunct Professor of Law
Hal R. Morris, B.A., M.B.A., J.D.
Adjunct Professor of Law
Wendy J. Muchman, B.A., J.D.
Adjunct Professor of Law
Michael Nathanson, B.S., Ph.D.
Adjunct Professor of Law
Marcia J. Nawrocki, B.S., J.D., LL.M.
Adjunct Professor of Law
Meagan N. Newman, B.A., J.D.
Adjunct Professor of Law
Valerie R. Neymeyer-Tynkov, B.A., M.S., J.D.
Adjunct Professor of Law
Lance D. Northcutt, B.A., J.D.
Adjunct Professor of Law
Mary Lou Norwell, B.S., J.D.
Adjunct Professor of Law
Jared S. Palmer, B.S., J.D.
Adjunct Professor of Law
John B. Palmer III, B.A., J.D.
Adjunct Professor of Law
Jungyoon Jaz Park, B.A., J.D.
Adjunct Professor of Law
Lucy K. Park, A.B., M.A., J.D.
Adjunct Professor of Law

Todd S. Parkhurst, B.S., J.D.
Adjunct Professor of Law

Peter M. Parry, B.A., J.D.
Adjunct Professor of Law

Jeffrey R. Patt, B.S., J.D.
Adjunct Professor of Law

Pamela A. Paziotopoulos,B.A., J.D.
Adjunct Professor of Law

Scott V. Peters, B.A., Ph.D., J.D.
Adjunct Professor of Law

Phillip M. Pippenger, B.S.E.E., M.S.E.E., J.D.
Adjunct Professor of Law

John F. Pollick, B.A., J.D.
Adjunct Professor of Law

Ljubica D. Popovic, B.A., J.D.
Adjunct Professor of Law

Raymond W. Prather, B.A., J.D.
Adjunct Professor of Law

Hon. Lee Preston, B.S., J.D.
Adjunct Professor of Law

Matthew F. Prewitt, B.A., J.D.
Adjunct Professor of Law

Charles J. Prochaska, B.A., J.D.
Adjunct Professor of Law

Kevin R. Pryor, B.A., J.D.
Adjunct Professor of Law

Richard W. Renner, A.B., J.D., LL.M.
Adjunct Professor of Law

Bruce Richman, B.A., MS. . MS., M.B.A.
Adjunct Professor of Law

Leigh D. Roadman, B.S., J.D.
Adjunct Professor of Law

Jenifer M. Robbins, B.A., J.D.
Adjunct Professor of Law

Jeffrey S. Rothbart, B.A., J.D., LL.M.
Adjunct Professor of Law

Jeffrey C. Rubenstein, A.B., J.D., LL.M.
Adjunct Professor of Law

Susan J. Russell, B.A., M.A., J.D.
Adjunct Professor of Law

Vincent J. Samar, A.B., M.P.A., J.D., Ph.D.
Adjunct Professor of Law

Robert P. Scales, B.A., J.D., M.L.A.
Adjunct Professor of Law

Heather N. Schafer, B.S., M.S., J.D.
Adjunct Professor of Law

John T. Schaff, B.S., J.D.
Adjunct Professor of Law

Rick M. Schoenfeld, B.A., J.D.
Adjunct Professor of Law

Daniel C. Shapiro, B.A., J.D.
Adjunct Professor of Law

Laurie A. Silvestri, B.A., J.D.
Adjunct Professor of Law

Joseph E. Silvia, B.A., J.D., LL.M.
Adjunct Professor of Law

Amanda A. Sonneborn, B.A., M.H.R.I.R., J.D.
Adjunct Professor of Law

Donald F. Spak, A.B., J.D.
Adjunct Professor of Law

Matthew J. Stanton, B.A., J.D.
Adjunct Professor of Law

Tamara B. Starks, B.S., M.A., J.D.
Adjunct Professor of Law

Steven G.M. Stein, B.A., J.D.
Adjunct Professor of Law

Peter J. Strand, B.A., J.D.
Adjunct Professor of Law

Michael R. Strong, B.A., J.D.
Adjunct Professor of Law

John C. Strzynski, B.A., J.D., LL.M.
Adjunct Professor of Law

Robert A. Surrette, B.S.M.E., M.S.M.E., J.D.
Adjunct Professor of Law

Stephen R. Thorn, B.S., M.S., M.S., J.D.
Adjunct Professor of Law

Marcie E. Thorp, B.S., J.D.
Adjunct Professor of Law

Michelle M. Truesdale, B.A., J.D.
Adjunct Professor of Law

Douglas J. Tucker, B.A., J.D.
Adjunct Professor of Law

Lee M. Weisz, B.A., J.D.
Adjunct Professor of Law

Thomas M. White, B.A., J.D.
Adjunct Professor of Law

Richard A. Wilson, B.A., J.D.
Adjunct Professor of Law

Christopher J. Williams, B.A., B.S., J.D.
Adjunct Professor of Law

Charles Wintersteen, B.A.,M.A., J.D.
Adjunct Professor of Law

Michael Wise, B.A., J.D.
Adjunct Professor of Law

J. Bryan Wood, B.A., J.D.
Adjunct Professor of Law

Patricia Wrona, B.A., J.D.
Adjunct Professor of Law

Thomas M. Zollo, B.A., J.D.
Adjunct Professor of Law